

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations and Practices of the Conlin-Strawberry Water Co. Inc. (U-177-W), and its Owner/Operator, Danny T. Conlin; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Petition the Superior Court for a Receiver to Assume Possession and Operation of the Conlin-Strawberry Water Co. Inc. pursuant to the California Public Utilities Code Section 855.

Investigation 03-10-038
(Filed October 16, 2003)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION FOR DISMISSAL OR MEDIATION**

Respondent Conlin-Strawberry Water Company (Water Company or Respondent) filed a Motion for Full or Partial Dismissal or Suspension of Procedural Calendar Pending Mediation on February 26, 2004. After the Water Division's response and the Water Company's reply, the motion was orally argued on March 12, 2004, and taken under submission at that time.

The Water Company's pleading is styled as a motion to dismiss, which is the appropriate pleading under Rule 56 of the Commission's Rules of Practice and Procedure (Rule). Since the motion attempts to argue that material facts are not in dispute and that Respondent is entitled to relief on various claims set forth in the Order Instituting Investigation (OII), the motion is properly evaluated as a motion for summary judgment. The Water Company is entitled to a summary judgment (or dismissal under Commission procedures) on all or part of the OII if

“all the papers submitted show that there is not a triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Cf.* CAL. CIV. PROC. CODE § 437c(c). The pleadings of both parties, however, elevate their wide-ranging arguments over a careful specification and documentation of what material facts are, or are not, in dispute. In the future, counsel would be well-served to adapt the approach set forth in Code of Civil Procedure § 437c(b) for bringing motions for summary judgment before the superior court.

December 2002 Outage

The Water Company argues that the Water Division’s concern with the December 2002 power outage is overblown. The Water Company does not establish (but only alleges) that an answering machine had been purchased as previously ordered. The Water Company also does not address the OII allegations that Department of Health Services’ (DHS) personnel and Company customers were unable to contact respondent during the outage. The Water Company does not address the central statement made in the staff report that the outage resulted in the system having little or no water for an entire week. Status of Required System Improvements for the Water Company Verification Report Ordered by Resolution W-4207 at 17, Ex. 1 to OII (Verification Report). While the outage may have been beyond the Water Company’s control, the December 2002 episode presents many triable issues of material fact concerning the resulting impact on customers and the responsiveness of the operator. Summary judgment against the Water Division on this set of allegations is unwarranted.

Replacement of Manager/Engineering Study

The Water Division reports that the Water Company failed to replace Conlin with a qualified system operator or manager, as ordered by the Commission, but simply divided the role between Conlin and an employee.

Verification Report at 7. The Water Company objects to this interpretation, but offers no facts of its own. The issue must be tried.

The Water Company concedes that the required engineering study has not been completed, but argues that the study will be both futile and expensive. The issue must be tried to determine whether the Water Company has complied with the Commission's order concerning the study.

Safe Drinking Water Bond Act (SDWBA) Funds and Collections

The Water Company argues that the Water Division's conclusion that Safe Drinking Water Bond Act (SDWBA) funds were misappropriated is an old story from the 1980s. The Water Company was authorized under a Commission decision (D.83-05-052) to borrow money from the Department of Water Resources and to impose a surcharge on customers to repay the loan. The Verification Report estimates the misappropriated amount at \$113,000, perhaps due in part to improper payments to an affiliate company. The Water Company responds that no one questions that the construction work was done and that the Water Division is seeking to penalize the Water Company for its inability to produce all the relevant documents 17 years after the construction.

The fact that the construction contemplated by the loans may have been completed does not itself refute a possible inference that some of the loan amount may have been misappropriated. For example, the loan may have been (hypothetically) \$1 million, but construction costs totaled only \$800,000. In performance of its ratesetting function, the Commission is entitled to a complete explanation of the actual cost of property being added to the rate base.

On a related issue, the Water Company argues that the Water Division's suggestion of misappropriated SDWBA collections is also a stale allegation from the 1980s and, for the last 12 full years, the Water Company's deposits against

the loan actually have exceeded collections from customers. The Water Division's Audit Report, attached to the OII as Ex. 2, indicates that the Water Company collected but did not deposit almost \$62,000 through May 2003. In its motion, the Water Company adds to the factual presentation only a copy of the fiscal agent agreement and the unsupported circumstantial argument that the proper surcharges were collected and deposited since the fiscal agent never complained.

The existing information on the SDWBA collections and payments is so confusing as to qualify, on its face, as a triable issue of material fact. Most of the over-collections from customers appears to have occurred in the 1980s, but large discrepancies in recent years call into question the Water Company's ongoing business practices. Respondent's own motion indicates that in 2002, over \$40,000 was collected from customers but \$53,000 was deposited with the bank. Yet in the following year, \$17,000 was collected from customers but only \$7800 was deposited. The variations of collections and payments in these and other years require an explanation.

The Water Company throws up a series of statutes of limitations that the Water Company suggests bars inquiry into the events of the 1980s. While some of these provisions may be invoked if and when the Commission seeks to collect fines, penalties, or reparations from the Water Company, it is premature to consider them here. These statutes of limitations do not prevent the Commission, in seeking a receivership, from determining whether the Water Company has properly followed prior Commission orders. *See* Pub. Util. Code § 855 (Commission may seek receivership when the Water Company has been unresponsive to the rules or orders of the Commission).

Current System Condition/Customer Complaints

In the Scoping Memo, the Water Company was afforded the opportunity to develop a defense based on the current condition of the water system and the lack of recent customer complaints. In its motion, the Water Company now argues that there was only one customer complaint in September 2002 and no complaints for the last 18 months. The Water Company attaches the September 2002 complaint and it is a cover letter from the Strawberry Property Owners Association transmitting 38 other notes and letters to the Commission. These communications express frustration both with the Water Company and with the Commission for its failure to address problems with the Water Company. These notes and letters support reasonable inferences of widespread customer discontent and continuing water system problems.

The Water Company also argues that DHS appears satisfied with existing system operations. While such evidence may be relevant to the Water Company's defense, it does not answer all questions about current operations. DHS's responsibilities involve water quality; the Commission shares that responsibility but has additional obligations to ensure the proper fiscal management of the system.

The proffered evidence concerning current system operations is incomplete and disputed. Summary judgment is again inappropriate.

Request for Mediation

Much of the Water Company's motion is a request for mediation since, in respondent's view, such a procedure might lead to a more practical and less costly solution to this proceeding. The Water Division has not expressed a strong desire for mediation, with its attorney indicating that "we'll be more than

happy to [talk], but we don't need formal structure mediation. We can talk informally." Transcript 96:18-19 (Mar. 12, 2004); *see also id.* 93:14-96:19.

While I might require both parties to meet with a third-party for the sole purpose of exploring the feasibility of mediation, I am not convinced such a step would be promising at this time. The Water Division has not expressed a strong desire to engage in mediation. Based on my own recent experience in refereeing discovery disputes between these parties, both parties' positions and perspectives are far apart. Unless there is a more convincing, mutually supported request for mediation, I will not order even an initial session with a third-party.

IT IS RULED that Colin Strawberry Water Company's Motion for Full or Partial Dismissal or Suspension of Procedural Calendar Pending Mediation is denied.

Dated March 19, 2004, at San Francisco, California.

/s/ JOHN E. THORSON

John E. Thorson
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion for Dismissal or Mediation on all parties of record in this proceeding or their attorneys of record.

Dated March 19, 2004, at San Francisco, California.

/s/ ELIZABETH LEWIS
Elizabeth Lewis

N O T I C E

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The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at

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(415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.